

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
(SOUTH)

SUPERIOR COURT

OCTOBER TERM, 2002

State of New Hampshire

v.

Hitchiner Manufacturing Company, Inc.

Docket No.

CONSENT DECREE

A. INTRODUCTION

1. Petitioner, the New Hampshire Department of Environmental Services, through counsel, the Attorney General's Office ("State"), and defendant, Hitchiner Manufacturing Company, Inc. ("Hitchiner"), represented by counsel, McLane, Graf, Raulerson & Middleton, P.A., hereby agree to the terms and conditions set forth in this Consent Decree ("Decree"), as ordered by the Superior Court for Hillsborough County (South), in settlement of the hazardous waste violations alleged by the State in the Petition for Permanent Injunctive Relief and Civil Penalties (Petition) filed simultaneously with this Decree.

2. This Decree resolves all violations alleged in the State's Petition; in particular, violations of New Hampshire Hazardous Waste Management Act, RSA 147-A, and rules and permits issued thereunder. The State's Petition alleges, among other things, that Hitchiner treated, stored or disposed of hazardous waste without a permit and in violation of State law, improperly transported hazardous waste within New Hampshire and failed to properly manage hazardous waste at three facilities

located in Milford and Littleton, New Hampshire. The Petition seeks both permanent injunctive relief with regard to compliance with hazardous waste laws and civil penalties for the past violations.

3. There has been no trial on any issue of fact or law in this matter and no judicial determination of liability. Nothing herein shall be construed as an admission of fact or liability by Hitchiner. The State and Hitchiner, wishing to avoid the expense of litigation, agree without adjudication of facts or law, that settlement of this matter is in the public interest and that entry of this Decree without further litigation is an appropriate way to resolve the dispute, and the parties consent to the entry of this Decree.

NOW THEREFORE, it is ORDERED, ADJUDGED and DECREED as follows:

B. JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter and the Petition filed herein states a claim upon which relief can be granted pursuant to RSA 147-A:14, II and RSA 147-A:17, I. Venue is proper in Hillsborough County (South) because Hitchiner's corporate headquarters are located in Milford, New Hampshire.

5. For purposes of this Decree and the underlying Petition, including any further action to enforce the terms of this Decree, Hitchiner waives any and all objections it may have to the Court's subject matter or personal jurisdiction. Hitchiner also waives service of process of the underlying Petition and acknowledges that it has received a copy thereof.

C. COMPLIANCE WITH ADMINISTRATIVE ORDERS

6. Hitchiner represents that it has complied with Administrative Order No. WMD 99-78, issued on July 26, 1999, and Administrative Order No. WMD 99-145, issued on October 13, 1999, by the Department of Environmental Services Waste Management Division (hereinafter “DES”). Hitchiner agrees to withdraw any pending administrative appeals of such orders within thirty (30) days of the effective date of this Decree. Hitchiner also agrees to submit the information requested by DES in correspondence dated October 25, 2002, attached hereto as Exhibit A (Milford facility) and Exhibit B (Littleton facilities), on or before November 25, 2002, to allow DES to confirm that full compliance has been achieved with regard to all aspects of the Administrative Orders. Within sixty (60) days of Hitchiner’s submission of full documentation in response to Exhibits A and B, DES shall issue Notice(s) of Compliance to Hitchiner and the Administrative Orders shall be deemed closed. To the extent DES determines that Hitchiner violated any terms of the Administrative Orders after the effective date of such Orders, the parties agree that such noncompliance will be deemed as new violations, subject to separate enforcement action by the State consistent with paragraph 14 herein, and not as violations of the terms of this Decree.

D. INJUNCTIVE RELIEF

7. Hitchiner represents that, upon receipt of the July 26, 1999 Administrative Order, it immediately ceased treating and disposing of spent pickling liquor, which DES considered to be K062 hazardous waste (hereinafter “K062”), in the on-site wastewater treatment unit located at the Milford facility. Hitchiner agrees

that it will not treat or dispose of K062 hazardous waste at the Milford facility unless and until either: (a) the State issues a Limited Permit under the New Hampshire Hazardous Waste Rules, NH CODE ADMIN. RULES Part Env-Wm 100-1100 (hereinafter “Part Env-Wm”) for treatment of the K062 and the Town of Milford expressly agrees to accept the discharge to its publicly owned treatment works; or (b) the K062 waste stream is delisted by the U.S. Environmental Protection Agency pursuant to 40 C.F.R. Part 260 and by the New Hampshire Department of Environmental Services pursuant to Part Env-Wm 406.

E. CIVIL PENALTIES

8. Hitchiner agrees to make a cash payment of three hundred thousand dollars (\$300,000) to the State under the following payment schedule:

a. Within fifteen (15) days of the effective date of this Decree, Hitchiner shall pay one hundred thousand dollars (\$100,000);

b. Within ninety (90) days of the effective date of this Decree, Hitchiner shall pay an additional one hundred thousand dollars (\$100,000); and

c. Within one hundred eighty (180) days of the effective date of this Decree, Hitchiner shall pay an additional one hundred thousand dollars (\$100,000).

9. All payments under paragraph 8 and, if applicable, paragraph 10 herein shall be made by certified check payable to “Treasurer, State of New Hampshire – Hazardous Waste Cleanup Fund” and shall be delivered by hand or first class mail to the New Hampshire Attorney General’s Office, 33 Capitol Street, Concord, New Hampshire 03301, Attn: Maureen D. Smith, Senior Assistant Attorney General.

10. Any late payments shall be assessed interest at an annual rate of 10%, compounded daily, from the date the payment is due until the date the payment is received by the State

F. EFFECT OF AGREEMENT

11. This Decree and all obligations assumed hereunder shall apply to and be binding upon the State of New Hampshire Department of Environmental Services and upon Hitchiner, its officers, directors, employees, successors, assigns, and upon all persons, firms, subsidiaries, divisions or corporations acting under or for it.

12. The State covenants not to sue Hitchiner and its successors to the extent that their liability arises from the civil violations specifically alleged in the Petition. This covenant not to sue shall take effect upon full and timely payment of all civil penalty or penalties and is contingent upon full and satisfactory performance of all of Hitchiner's obligations under this Decree. The State reserves any and all legal and equitable remedies, sanctions and penalties that might be available to enforce the provisions of this Decree against Hitchiner for failure to comply with the requirements herein.

13. If the cash penalty provided in paragraph 8 of this Decree is not paid in accordance with the schedule set forth therein, then with respect to such penalty or penalties, this Decree shall be considered an enforceable judgment for purposes of post-judgment collection statutes, court rules and other applicable authorities.

14. The parties acknowledge that Hitchiner, its successors and assigns, have a continuing obligation to remain in compliance with RSA 147-A and all rules and permits issued thereunder. The State reserves the right to bring administrative,

civil and/or criminal enforcement action for any violation of hazardous waste management statutes, rules and permits arising after the date of the alleged violations set forth in the Petition.

15. This Decree is neither a hazardous waste permit nor a modification of any existing limited or other hazardous waste permit and shall not be interpreted as such. The outcome of any proceeding concerning delisting of hazardous waste or the issuance or modification of any permit shall neither affect nor postpone Hitchiner's obligations as set forth in this Decree.

16. It is the intention of the parties that this Decree be entered and enforced as an order of the Court. Upon entry of the order by the Court, Hitchiner acknowledges that any violation of the Decree or the agreements reflected herein may be cause for Hitchiner being adjudged in contempt of court and hereby waives any objection to jurisdiction if such remedy is sought by the State.

17. The State's failure to enforce any provision of this Decree after any breach or default shall not be deemed a waiver of its right to enforce each and all of the provisions of this Decree upon any further breach or default.

18. The effective date of this Decree shall be the date upon which it is entered as an order of the Court.

19. There shall be no material modification of this Decree without the written approval of the parties to the Decree and the approval of the Court. All non-material modifications, such as extension of time frames and schedules for performance of the terms and conditions of the Decree, may be made by written agreement of the parties.

20. The provisions of this Decree shall be construed in accordance with the laws of the State of New Hampshire.

21. The State and Hitchiner shall each bear its own costs and attorneys' fees for this action.

22. Upon approval and entry of this Decree, the Decree shall constitute a final judgment under state and federal law and in any proceeding under Title 11 of the United States Code, the cash penalty included and set forth in paragraph 8 shall constitute an allowed claim with the priority specified in 11 U.S.C. §726(a)(2).

G. TERMINATION OF THE DECREE

23. This case shall be closed following entry of the Decree and shall be reopened upon motion by either party. The Court shall retain jurisdiction to enforce the terms and conditions of the Decree and to resolve disputes arising hereunder, as may be necessary or appropriate for the construction, execution or implementation of the Decree. The Decree shall terminate after a determination by the State or the Court that Hitchiner has fulfilled all of its obligations under paragraphs 6, 7 and 8 of the Decree.

Consented To:

THE STATE OF NEW HAMPSHIRE

PHILIP T. MCLAUGHLIN
ATTORNEY GENERAL

Dated: October __, 2002

By: _____

Maureen D. Smith
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679

HITCHINER MANUFACTURING
COMPANY, INC.

Dated: October ___, 2002

By: _____

Duly Authorized

COUNSEL FOR HITCHINER
MANUFACTURING COMPANY, INC.

Dated: October ___, 2002

By: _____

Gregory Smith, Esquire
Barry Needleman, Esquire
McLane, Graf, Raulerson &
Middleton, PA
15 North Main Street
Concord, New Hampshire 03301
(603) 226-0400

The Court finds that this Consent Decree is a reasonable and fair settlement and adequately protects the public interest in accordance with the New Hampshire Hazardous Waste Management Act, RSA 147-A. Dated and entered this _____ day of _____, 2002.

SO ORDERED.

Presiding Justice